BEFORE

THE PUBLIC SERVICE COMMISSION OF

SOUTH CAROLINA

DOCKET NO. 2018-364

Stephen and Beverly Noller and Michael and Nancy Halwig, Complainants, v. Daufuskie Island Utility Co., Inc., Respondent.	**REPLY BRIEF ON JURISDICTIONAL MATTERS BY RESPONDENT DAUFUSKIE ISLAND UTILITY CO., INC. WITH CONSENT FOR DECISION ON THE ISSUE WITHOUT ORAL ARGUMENT**

The Complainants' Brief Confirming Jurisdiction ("Complainants' Brief") asserts that "The Commission has jurisdiction over this matter because DIUC's actions denied service to its existing customers, failed to comply with the Commission's regulations, and was based on an unauthorized agreement." Complainants' Brief at 2. Not one of these three broad categories is sufficient to bring this matter within the Commission powers enumerated in its statutory grant of jurisdiction; therefore, the Complainants demand for payment of over $100,000 cannot be granted and this matter should be dismissed.

First, as the Complainants admit, the water and sewer service lines to their homes were twice destroyed by storm events, with the most recent occurring in 2016 when "the mains were destroyed by Hurricane Matthew." M.Halwig Complaint Form at 1, N.Halwig Complaint Form at 1; B.Noller Complaint Form at 1; *see also* Complaint at 1 ("As a result of the erosion from Hurricane Matthew, a portion of Driftwood Cottage Lane was washed out, and with it water and sewer mains…."). Therefore, DIUC did not deny service to any customers; a hurricane washed away the infrastructure *twice* and in the second storm the entire right-of-way was destroyed leaving DIUC without a safe and proper way to service the Complainants.

Several weeks after Hurricane Matthew, in late 2016, the Halwigs filed a Complaint with the South Carolina Office of Regulatory Staff ("ORS") regarding what the Complaint in this matter refers to as "the refusal of DIUC to restore service" after the hurricane washed away Driftwood Cottage Lane and the service equipment serving their two homes. Complaint at 1. The Complaint in this matter goes on to state that ORS responded via letter dated December 2, 2016, stating "that the statutes do not provide a definitive time frame within which service has to be restored." *Id.*

Instead of at that time continuing to pursue their complaint through the Commission's proper channels, the Complainants abandoned the statutory procedure and undertook to build their own infrastructure. By initiating their complaint in 2016, the Complainants availed themselves of the jurisdiction of the Commission but then disregarded the Commission's jurisdiction and pursued a remedy via contract with DIUC. The Complainants removed this matter from Commission jurisdiction by choice. They took their dispute with DIUC into the private sector, negotiated a contractual remedy, obtained assistance from DIUC with locating contractors, and signed a Customer Service Agreement ("CSA") whereby DIUC would take ownership of the new facilities. Then, after using the CSA to their benefit to obtain service, the Complainants initiated this claim to void the CSA and to ask the Commission to order DIUC to pay them over $100,000 for what they voluntarily spent in conjunction with the CSA. Additionally, after taking their dispute with DIUC into the private sector and negotiating a contractual remedy, Complainants now attempt to assert this Commission has jurisdiction to void that private contract because it represents DIUC's attempt to "circumvent the Commission's authority over rates." Complainants' Brief at 7. That is simply not consistent with the facts as alleged and cannot sustain the Complainants burden for establishing jurisdiction to hear their claim. *See In Re: Bellsouth Telecommunications, Inc.-Transit Traffic Tariff 2005-50*, No. 2005-63-C, 2006 WL 7358110, at *1 (Mar. 28, 2006) (The

party seeking relief in a complaint proceeding bears the burden of establishing this Commission has jurisdiction to hear their claims and to grant the relief they seek.).

Even if the Complainants' own actions did not demonstrate that they intended to and did, in fact, remove this matter from Commission jurisdiction, the South Carolina Supreme Court has provided the Commission with clear instruction on how to address its jurisdiction over a particular complaint. When analyzing its jurisdiction, the Commission must look to determine "the real issue" at stake. *See Martin v. Carolina Water Servs., Inc.*, 273 S.C. 43, 46, 254 S.E.2d 52, 53 (1979). Clearly, in this matter, as it also was in *Lindler v. Baker*, 280 S.C. 130, 131–32, 311 S.E.2d 99, 100 (Ct. App. 1984), the question is not the reasonableness of service but is, instead, a common pleas question of contract interpretation and availability of remedies. Cases like this one do not raise the narrow question of "the reasonableness of a rate charged by a public utility, which, under Section 58–5–210 of the South Carolina Code of Laws (1976)" is properly within the Commission's jurisdiction. *Id.* The Complainants' seek a ruling contrary to the caselaw and one that inappropriately disregards the distinction our courts have recognized between regulatory matters and business contracts.

With or without the Complainants' decision to remove their dispute from Commission jurisdiction, an examination of the "real issue" in this matter demonstrates the Complainants raise questions the Commission is not empowered to address and seek remedies the Commission cannot grant.[1]

[1] If the Commission has any reasonable doubt regarding its jurisdiction, the South Carolina Supreme Court has explicitly instructed that the Commission should decline to hear the matter. See *S.C. Elec. & Gas Co. v. Pub. Serv. Comm'n*, 275 S.C. 487, 489–90, 272 S.E.2d 793, 794–95 (1980) (Any reasonable doubt of the existence in the Commission of any particular power should ordinarily be resolved against its exercise of the power.); *see also State v. Manning*, 305 S.C. 413, 416, 409 S.E.2d 372, 374 (1991) (citing *Holland v. United States,* 348 U.S. 121, 75 S.Ct. 127 (1954) ("A reasonable doubt is the kind of doubt that would cause a reasonable person to hesitate to act."). Certainly, the Commission request for briefing indicates the presence of doubt sufficient to require the Commission to decline to hear this matter.

Contrary to the assertions in the Complainants' Brief, DIUC has complied with all Commission regulations, including S.C. Code Regs. §§ 103-540 and 103-740 as cited in the Complainants' Brief. These Regulations require utilities to "operate and maintain in safe, efficient and proper conditions all of its facilities and equipment used in connection with the services it provides." S.C. Code Regs. §§ 103-540 and 103-740. Isolating the first words of the regulations, as opposed to reading all the words collectively and in context, the Complainants assert Sections 103-540 and 103-740 "provide that a public utility shall install and maintain its facilities and equipment." Complainants' Brief at 3. That is technically correct; however, these regulations read as a whole demonstrate the intent is to direct utilities to ensure their facilities and equipment are operated under "safe, efficient and conditions." S.C. Code Regs. §§ 103-540 and 103-740.

As the Supreme Court has instructed many times:

> A statute as a whole must receive practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of lawmakers. In interpreting a statute, the language of the statute must be read in a sense that harmonizes with its subject matter and accords with its general purpose." *Id.* (citation omitted).

Sparks v. Palmetto Hardwood, Inc., 406 S.C. 124, 128, 750 S.E.2d 61, 63 (2013) (quoting *Town of Mt. Pleasant v. Roberts,* 393 S.C. 332, 342, 713 S.E.2d 278, 283 (2011). Reading the regulations practically and reasonably does not lead to the Complainants' conclusion that the *purpose* of the cited regulations is to require service be provided. Instead, reading the regulations "in a sense that harmonizes with its subject matter and accords with its general purpose" demonstrates the purpose of the regulations is to address the provision of service in a safe and efficient manner.

The Complainants cannot isolate words and rewrite regulations to suit their purposes. The rules of statutory interpretation are clear:

> "[W]ords in a statute must be construed in context." *Southern Mut. Church Ins. Co. v. South Carolina Windstorm and Hail Underwriting Ass'n,* 306 S.C. 339, 342, 412 S.E.2d 377, 379 (1991). Thus, "the Court may not, in order to give effect to

> particular words, virtually destroy the meaning of the entire context; that is, give the particular words a significance which would be clearly repugnant to the statute, looked at as a whole, and destructive of its obvious intent." *Id.*

Sparks v. Palmetto Hardwood, Inc., 406 S.C. 124, 128–29, 750 S.E.2d 61, 63 (2013).

By failing to properly analyze the regulations, the Complainants' Brief refuses to address the fact that the operative language in the cited Regulations when read in context and as a whole, demonstrate the intent is to address provision of safe service.[2]

Third, the Complainant's Brief alleges that the Customer Service Agreement ("CSA") was not authorized by the Commission, it was therefore invalid, and that invalidity conveys jurisdiction upon this commission to hear complainants' claims. *See* Complainant's Brief at 6. This wholly illogical position is based upon a theory that SC Code Reg. §§ 103-541 and 103-743 required DIUC obtain Commission approval for the CSA. Complainants Brief focuses on the Regulations' requirement that a utility agreement or contract should be submitted to the Commission and ORS for approval if the agreement "would impact, pertain to, or effect said utility's fitness, willingness or ability to provide water service." Again, the Complainants ignore the primary focus of the Regulations, which is whether or not the agreement in question could potentially affect the utility's ability to provide service. The reference in the Regulations is the overall fitness of the utility to

[2] Safe service has been DIUC's focus in responding to the second washout of Driftwood Cottage Lane. As set forth in the DIUC Answer, there was no way to safely provide service after the hurricane and there was no way to provide service in an economically appropriate or efficient manner; the roadways could not be rebuilt and without them any infrastructure re-installed by DIUC would have been unprotected from the elements. *See* Answer at 2 (stating DIUC determined "the homes at issue lack any significant protection from erosion and equipment installed would not last very long at all before again being destroyed by erosion."). The Melrose POA concurred. *See* Answer at 1 (citing Email, December 19, 2016, from MPOA President (stating "Unfortunately the Atlantic Ocean has proved to be a force we cannot compete with" and therefore the MPOA "cannot reconstruct or protect Driftwood Cottage Lane because it is not allowed [by OCRM] to use the materials necessary to ensure any permanence to the effort.")). As also explained in the DIUC Answer, DIUC considered and addressed the efficiency requirement of the regulations. *See* Answer at 2 ("DIUC determined it would not be prudent to expend other ratepayers' funds to acquire a new easement and then reconstruct services to these homes").

safely and securely provide service to its customers; the regulation is not intended to apply to an agreement such as the one present that does not implicate or have the ability to implicate the utility's financial and physical ability to provide service. To read the regulations as Complainants suggest would be to unlawfully give effect to particular words thereby destroying the meaning of the entire context. *See Sparks v. Palmetto Hardwood, Inc.*, 406 S.C. 124, 128–29, 750 S.E.2d 61, 63 (2013) (warning of the dangers of a statutory interpretation that would "give the particular words a significance which would be clearly repugnant to the statute, looked at as a whole, and destructive of its obvious intent").

The "real issue" as stake here is the Complainants' request that this Commission void a contract that the Complainants sought in lieu of presenting their 2016 complaint to the Commission. Now, after using that contract to their benefit, the Complainants ask this Commission to enter an order of money damages in their favor based on a claim that they were forced to enter the contract. None of these issues is properly within Commission jurisdiction and the Complainants' Brief fails to establish otherwise. The Commission does not have jurisdiction to hear the Complainants' claims or to grant the relief they seek.

Resolving any reasonable doubt as to jurisdiction by declining to hear this matter, in accordance with *S.C. Elec. & Gas Co. v. Pub. Serv. Comm'n*, 275 S.C. 487, 489–90, 272 S.E.2d 793, 794–95 (1980), the Commission should dismiss the matter.

Further, should the Commission determine based upon the filings that oral argument is not necessary on this issue, DIUC certainly consents to the Commission deciding this jurisdictional question without oral argument.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 13, 2019, I caused to be served a copy of the foregoing Reply Brief upon:

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I further certify that the above-referenced Reply Brief is a true and correct copy of the Reply Brief that I e-filed in the above-referenced matter and vie email served:

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